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In The

Supreme Court of the United States

October Term, 1992

GENERAL MOTORS ACCEPTANCE CORPORATION,

Petitioner,

vs.

GEORGE H. MITCHELL AND CAROL J. MITCHELL,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF OF AMERICAN FINANCIAL SERVICES ASSOCIATION AND CONSUMER BANKERS ASSOCIATION AS AMICI CURIAE IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF OF AMERICAN FINANCIAL SERVICES ASSOCIATION AND CONSUMER BANKERS ASSOCIATION AS AMICI CURIAE IN SUPPORT OF PETITIONER

The American Financial Services Association and the Consumer Bankers Association respectfully move for leave to file the attached brief as amici curiae in support of the Petition. Counsel for petitioner has given his consent to the filing of this brief. The consent of counsel for the Mitchell respondents was requested but refused.

The American Financial Services Association ("AFSA") is the nation's largest trade association representing non-bank providers of consumer financial services. Organized in 1916, AFSA represents 367 companies operating 10,910 offices engaged in extending $190 billion of consumer credit throughout the United States. These companies range from independently-owned consumer finance offices to the nation's largest financial services, retail and automobile companies.

Retail and automobile credit is extended through thousands of stores and dealers. Consumer finance companies hold over $190 billion of consumer credit outstanding and over $50 billion in second mortgage credit representing one quarter of all consumer credit outstanding in the United States.

The Consumer Bankers Association ("CBA") was founded in 1919 to provide a progressive voice for the retail banking industry. CBA represents approximately 700 federally insured banks, savings and loans and credit

unions that, in aggregate, hold more than 80% of all consumer deposits and more than 70% of all consumer credit held by federally insured depository institutions.

As explained in the Interest of Amici Curiae section of the attached brief, amici and their members have a vital interest in the outcome of the issue presented by the petition. Members of amici are involved as secured creditors in thousands of Chapter 13 proceedings each year. Many of those proceedings involve the valuation issue raised in the petition. Certainty about the appropriate standard for valuation of collateral retained by the debtor under a Chapter 13 plan is sorely needed by the bankruptcy courts, debtors and creditors alike.

Amici believe that their participation may help ensure that the Court is presented with a full exposition of the issue presented in the petition in the context of Congress' intent to require debtors to share with their creditors the enhanced value attributable to reorganization. Congress made this choice cognizant of the added risks secured creditors encounter in Chapter 13 proceedings and the costs to other consumers of overly generous benefits to debtors in bankruptcy. Amici will also show the deleterious effect that denial of the writ would have on the bankruptcy courts, debtors and creditors and on

the orderly, efficient provision of consumer financial services.

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INTEREST OF AMICI CURIAE

The American Financial Services Association ("AFSA") is the nation's largest trade association representing non-bank providers of consumer financial services. Organized in 1916, AFSA represents 367 companies operating 10,910 offices engaged in extending $190 billion of consumer credit throughout the United States. These companies range from independently-owned consumer finance offices to the nation's largest financial services, retail and automobile companies.

Retail and automobile credit is extended through thousands of stores and dealers. Consumer finance companies hold over $190 billion of consumer credit outstanding and over $50 billion in second mortgage credit representing one quarter of all consumer credit outstanding in the United States.

The petitioner and other major automobile sales finance companies are members of AFSA. In thousands of bankruptcy proceedings each year, each of these companies faces the question presented by the petition: How is the automobile to be valued when the debtor proposes to retain and pay for it through his or her Chapter 13 plan?

A decision by this Court adopting a uniform, nationwide standard of valuation would greatly benefit these consumer lenders, allowing them to predict their potential bankruptcy losses and settle, rather than litigate, valuation questions with debtors.

Other AFSA members would also benefit from this Court's granting certiorari in this case. The standard of

valuation under 11 U.S.C. § 506(a) affects all collateral, not just cars. Homes and other real property must also be valued to determine how much of a creditor's claim is secured. The courts are in just as great disagreement about how to value real property as they are on how to value automobiles.

Some courts routinely deduct 10% of the value of real property collateral as hypothetical selling costs. *E.g., In re Overholt*, 125 B.R. 202, 215 (S.D. Ohio 1990). A "growing number of courts have rejected this line of reasoning, and have refused to deduct the sale costs in rendering a § 506 calculation unless the debtor's plan contemplates selling the property on the open market." *In re 222 Liberty Assoc.*, 105 B.R. 798, 803 (Bankr. E.D. Pa. 1989), quoted and followed in *In re Balbus*, 933 F.2d 246, 249-50 (4th Cir. 1991).

This issue is of vital concern to the many AFSA members that are second mortgage lenders. As the recent decision in *In re Weber*, ___ B.R. ___, 1992 WL 120156 (S.D. Ohio 1992) illustrates, deduction of hypothetical sales costs drastically reduces the amount paid second mortgage lenders in Chapter 13 plans, particularly when the economy and the real estate market are sagging. *See* Polk, *The Chapter 13 Cramdown: New Nightmare for the Lender*, 19 Real Estate L. J. 279, 279-80 (1991).

The Consumer Bankers Association ("CBA") was founded in 1919 to provide a progressive voice for the retail banking industry. CBA represents approximately 700 federally insured banks, savings and loans and credit unions that, in aggregate, hold more than 80% of all

consumer deposits and more than 70% of all consumer credit held by federally insured depository institutions.

CBA's member institutions make consumer loans secured by homes, cars and other personal or real property. Like AFSA members, CBA member institutions are vitally concerned that a proper, uniform standard be adopted for valuation of collateral in bankruptcy.

Valuing collateral is a fundamental task of the bankruptcy courts which affects numerous decisions, rights and remedies under various sections of the Bankruptcy Code. With the currently rising tide of consumer bankruptcies in the United States, many of AFSA's and CBA's members are confronted, as never before, with the need for certainty and predictability as to their rights as creditors in bankruptcy. A decision by this Court on the core issue of valuation of collateral would be a major step toward meeting this need.

SUMMARY OF ARGUMENT

1. The Court should grant certiorari to bring certainty and predictability to this fundamental area of bankruptcy practice. As the petition shows, the lower courts are in considerable disarray on how to value collateral retained by a debtor. Among the dozens of lower court decisions on the issue, opinions can be found to support virtually any point of view.

Only lawyers find comfort in being able to cite authority on every side of an issue. For clients – be they debtors or creditors – the current state of the law on this

issue is a disaster. The multiplicity of conflicting decisions encourages litigation and discourages settlement, as the large number of conflicting decisions itself proves.

Consumer credit is a high-volume, low balance business which requires legal certainty to operate efficiently. Unclear or uncertain legal standards breed transactions costs – litigation expense – that quickly overwhelms the comparatively small amounts at stake in any given case, about $3,000 in this case, for example. Debtors, too, can ill afford such litigation.

The lower courts, debtors and creditors alike need the certainty and uniformity which only this Court can bring by granting review and deciding the issue raised by the petition.

2. The decision below not only creates an inter-Circuit conflict, thus exacerbating the disarray of lower court opinions on the issue raised by the petition, but it also reaches the wrong result, ignoring Congress' stated intent to allow creditors to share in the enhanced value generated by a debtor's proceeding under Chapter 13 rather than under Chapter 7.

In enacting the Bankruptcy Reform Act of 1978 and the Bankruptcy Amendments and Judgeship Act of 1984, Congress encouraged consumer debtors to proceed under Chapter 13 rather than to liquidate under Chapter 7. Congress did so because reorganization enhances value.

Part of the bargain Congress struck in Chapter 13 was that the debtor share some of this enhanced value with his or her creditors. The Chapter 13 plan must treat holders of unsecured claims at least as well as they would

be treated in a straight liquidation under Chapter 7. Holders of secured claims must be given even better treatment. They are entitled to share in the enhanced value of the reorganization to the extent the debtor's proposed use or disposition of the collateral gives it greater value than it would have on foreclosure or liquidation.

Read in light of this underlying policy, the subdivisions of 11 U.S.C. § 1325 are consistent with each other and form a harmonious whole with the two sentences of 11 U.S.C. § 506(a). The opinion below ignores Congress' intent and improperly reads § 506(a) as denying secured creditors any part of the enhanced value of reorganization.

3. Granting secured creditors a portion of the enhanced value due to reorganization compensates them in part for the increased risks they incur in reorganization.

To be confirmed, a Chapter 13 plan must promise to the holder of a secured claim payment of an amount equal to the present value of that claim. 11 U.S.C. § 1325(a)(5)(B)(ii). But a promise to pay equivalent value is not worth as much as cash in hand, which the creditor would receive on foreclosure or liquidation. Promises are cheap because they are often not fulfilled. At least a third of Chapter 13 plans are never completed, and those cases are dismissed or converted to a Chapter 7 liquidation.

The collateral's value will have declined meanwhile, most often at an accelerated pace because the debtor is unable to pay for necessary maintenance. This is particularly true of cars and other similar collateral which

require regular, costly maintenance. As a result, on dismissal or conversion of an unsuccessful Chapter 13 plan, the creditor loses still more.

Congress determined that debtors should compensate secured creditors for these increased risks and required debtors to share with secured creditors part of the reorganization-enhanced value of their collateral. The decision below improperly fails to recognize this fact.

4. Interpreting 11 U.S.C. §§ 506(a) and 1325(a)(5), as the Ninth Circuit did, to allow debtors to retain collateral while paying secured creditors only its foreclosure value gives debtors an unwarranted bounty. That largess does not come free.

Read as the Ninth Circuit did, the Bankruptcy Code works as Robin Hood in reverse, robbing often poorer consumers to pay for the profligacy of the few through higher prices, higher credit charges or decreased availability of credit.

The Ninth Circuit misread the Bankruptcy Code, mistook Congress' intent, and misunderstood social policy. Its decision in this case conflicts with the reasoning and result in *In re Balbus, supra,* 933 F.2d 246. The debate over the proper standard of valuation of property retained by a debtor – which has been raging in the bankruptcy and district courts for more than a decade – has now reached the level of an inter-Circuit conflict.

It is time for this Court to step in, grant certiorari, and bring order out of this existing chaos.

ARGUMENT

1. Certiorari Should Be Granted To Resolve The Inter-Circuit Conflict And Make The Valuation Of Collateral In Bankruptcy Predictable.

The Court should grant the petition in this case to resolve the conflict between the Ninth Circuit's decision in this case and the Fourth Circuit's decision in *In re Balbus, supra,* 933 F.2d 246. The clash between these two decisions is symptomatic of the on-going and much more extensive controversy among the district and bankruptcy courts concerning the proper standard for valuing collateral retained by a debtor in bankruptcy. *See* Petition for Certiorari, App. E.

Petitioner has catalogued 73 lower court decisions on this issue. More will continue to appear until this Court resolves the issue. *See, e.g., In re Dixon,* ___ B.R. ___, 1992 WL 103624 (W.D. N.Y. 1992).

Now is the time for the Court to grant certiorari and end this splintering of authority. Continuing dissension among lower courts on this issue harms all participants in bankruptcy.

Valuation of collateral is a crucial task that bankruptcy courts must perform daily. In many different contexts, and under many different sections of the Bankruptcy Code, rights hinge on how much the collateral is worth. Carlson, *Secured Creditors and the Eely Character of Bankruptcy Valuations,* 41 Am. U. L. Rev. 63, 66-70 (1991).

Uncertainty about how to perform such a fundamental task spawns litigation wasting the courts' time and the

parties' money. The uncertainty forces courts to consider time and again the same valuation question, as the 73 published lower court decisions, collected in Appendix E to the Petition demonstrate. The bankruptcy courts can ill afford this unnecessary task, burdened as they now are by a rapidly rising tide of bankruptcy filings.[1]

The continuing conflict on this question is at least as harmful to debtors and creditors. Because the parties do not know by what standard the court will value collateral, they find it harder to settle valuation disputes. Litigating the valuation issue causes legal expense that financially strapped debtors cannot pay.

Creditors suffer, too, when forced to fight the same issue repeatedly. They also incur litigation expense that substantially reduces the net return on money lent the debtor. While the amounts at stake in any single bankruptcy are small, the cumulative losses from the many thousands of bankruptcy cases are substantial.

Because consumer credit involves a large volume of comparatively small loans, it is a business particularly susceptible to harm from the increased costs associated with this sort of legal uncertainty.

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[1] According to the Administrative Office of the United States Courts, bankruptcy filings during the 12 months ending March 31, 1992 exceeded the previous year's filings by 16.4% nationally. Bankruptcy filings in the First Circuit were up by 25.5%, in the Second Circuit up by 33.4%, in the Third Circuit up by 28.2%, in the Fourth Circuit up by 23.3%, and in the Ninth Circuit up by 21%. Bankruptcy Statistical Information, prepared by the Administrative Office of the United States Courts.

Only a decision by this Court can bring the needed certainty and predictability to this important area of bankruptcy law. Further decisions by the lower courts will only add to the cacophony of the dozens of decisions already addressing the issue.

The Court should take this opportunity to grant certiorari and establish a clear, nationwide rule on the standard of valuation of collateral retained by the debtor.

2. Congress Intended Creditors To Share In The Enhanced Value Arising From Reorganization; Sections 506(a) And 1325(a)(5)(B) Must Be Interpreted To Accomplish That End.

The Ninth Circuit's decision in this case not only exacerbates the disarray of lower court opinions on the valuation question, but it also misinterprets 11 U.S.C. §§ 506(a) and 1325(a)(5)(B)(ii), ignoring Congress' stated intent to allow creditors to share in the enhanced value generated by a debtor's proceeding under Chapter 13 rather than under Chapter 7.

In enacting the Bankruptcy Reform Act of 1978 and the Bankruptcy Amendments and Judgeship Act of 1984, Congress intended to encourage consumer debtors to proceed under Chapter 13 rather than under Chapter 7. *See* H.R. Rep. 595, 95th Cong., 1st Sess. 118, 125 (1977) *reprinted in* 1978 U.S. Code Cong. & Admin. News 5963, 6079, 6086; 130 Cong. Rec. H7499 (daily ed. June 29, 1984) (remarks of Rep. Anderson); 130 Cong. Rec. S8894 (daily ed. June 29, 1984) (remarks of Sen. Hatch), *reprinted in* 1984 U.S. Code, Cong. & Admin. News 590, 598.

As Congress recognized, proceeding under Chapter 13, rather than Chapter 7, should benefit both debtors and creditors. Chapter 13 proceedings help debtors avoid the stigma of bankruptcy and any resulting blot on their credit standing. Fulfillment of a Chapter 13 plan allows the debtor "to retain the pride attendant on being able to meet one's obligations." H.R. Rep. 595, *supra*, at 118; 1978 U.S. Code, Cong. & Admin. News at 6079.

Most importantly, Chapter 13 benefits the debtor by allowing the debtor to retain his or her assets. *Ibid*. Retention of assets is a benefit because a debtor's personal property and home are normally worth more to the debtor and cost more to replace than the price at which they can be sold. H.R. Rep. 595, *supra*, at 124; 1978 U.S. Code, Cong. & Admin. News at 6085.

Chapter 13 was also intended to aid creditors: "The benefit to creditors is self-evident: Their losses will be significantly less than if their debtors opt for straight bankruptcy." H.R. Rep. 595, *supra*, at 118; 1978 U.S. Code, Cong. & Admin. News at 6079.

Congress' intent that debtors and creditors both share in the increased value of a reorganization under Chapter 13 is evident not only in the legislative history, but in the statutory text, as well. Section 1325(a)(4) requires Chapter 13 plans to provide holders of unsecured claims "not less than the amount that would be paid on such claim if the estate of the debtor were liquidated under chapter 7 of this title. . . ." As the House Report states, Chapter 13 allows debtors to propose realistic payment plans, but "[c]reditors will not be

disadvantaged, because the plan must still pay them more than they would get under a liquidation." H.R. Rep. 595, *supra*, at 124; 1978 U.S. Code, Cong. & Admin. News at 6085.

Holders of secured claims must receive even better treatment under Chapter 13 plans. Unless a secured creditor accepts the plan or the debtor surrenders the collateral, the plan must give the secured creditor a continuing lien in the collateral and provide for payment of an amount "not less than the allowed amount of such claim." 11 U.S.C. § 1325(a)(5)(B)(ii).

The allowed amount of the secured claim is determined under section 506(a), which directs that the value of the creditor's interest in the estate's interest in the collateral be determined in light of the purpose of the valuation and the proposed use or disposition of the property. The proposed use or disposition of the collateral under a Chapter 13 plan typically is retention by the debtor, a use which Congress recognized enhanced the value of the collateral – hence, benefited the debtor. By taking that value enhancement into account in setting the allowed amount of secured claims for purposes of Chapter 13 plans, Congress achieved the sharing of benefits from reorganization which it intended to establish.

This interpretation of sections 506(a) and 1325(a)(5) not only harmonizes their provisions but achieves the goals Congress intended to achieve when it enacted Chapter 13.

By contrast, the Ninth Circuit's reading of section 506(a) not only sets its two sentences in conflict, *see In re Claeys*, 81 B.R. 985, 990-91 (Bankr. D. N.D. 1987), but

renders section 1325(a)(5) largely superfluous[2] and contravenes Congress' stated intent.

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[2] Under the Ninth Circuit's reading, the allowed amount of a secured claim would rarely, if ever, exceed foreclosure value. *See* 954 F.2d 557, 560. Foreclosure value is what a secured creditor receives in a Chapter 7 liquidation, either through the estate's surrender of the collateral for sale by the creditor or through sale by the trustee. *See* 11 U.S.C. §§ 362, 363, 554, 725. Had Congress meant for secured creditors to be guaranteed only this minimal value in Chapter 13 plans, it would not have treated them separately under section 1325(a)(5), but would have simply combined both secured and unsecured claims under section 1325(a)(4), which guarantees payment of an amount not less than would be paid on the claim under a straight liquidation.

In re Dixon, supra, 1992 WL 103624 illustrates this point. In *Dixon,* an *unsecured* creditor objected to a Chapter 13 plan on the ground that it failed to pass muster under section 1325(a)(4). The creditor claimed that unsecured creditors would receive more from liquidation than under the Chapter 13 plan because the debtor's home could then be sold to pay unsecured creditors' claims. The creditor argued that hypothetical selling costs should not be subtracted from the home's value in computing the home's value for purposes of making this comparison.

Rejecting this contention, the court distinguished authorities which looked "only to market price, without deduction for costs of sale, when dealing with many of the provisions of the Bankruptcy Code which, like § 522(f), require the Court to determine the 'value' of the property. Here it is agreed that the value of the debtor's home is $100,000. The dispute does not involve the 'value' of anything. What is at issue is the amount that creditors would ultimately receive if this home were sold for $100,000 in a Chapter 7 case concerning this debtor." *Id.,* at *1. Finding that selling costs would inevitably be incurred in a sale of the home under Chapter 7, the Court concluded that deduction of hypothetical costs of sale was appropriate under the "not

The Court should grant the petition to vindicate Congress' stated intent as to the treatment of secured claims in Chapter 13 proceedings.

3. Sections 506(a) And 1325(a)(5)(B) Were Intended And Should Be Interpreted To Compensate Holders Of Secured Claims For The Added Risks They Incur Under Chapter 13.

Congress had good reason to require debtors to share with secured creditors the reorganization enhancement in the value of collateral. Chapter 13 proceedings pose added risks to secured creditors for which they should be compensated.

Under section 1325(a)(5)(B)(ii), the Chapter 13 plan must provide that *over the course of the plan* the secured creditor will receive property with a present value equal to the value of the collateral. Most Chapter 13 plans comply with this subdivision by providing that the

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less than would be received under Chapter 7 liquidation" test of section 1325(a)(4).

Under the Ninth Circuit's construction of section 506(a), the exact same result would obtain under section 1325(a)(5)(B)(ii) even though that section guarantees secured creditors the "value" of their collateral, not merely as much as they would receive under a Chapter 7 liquidation. *See, e.g., In re Weber, supra,* ___ B.R. ___, 1992 WL 120156 at *2-4. Under this reading subdivisions (a)(4) and (a)(5) achieve the same results despite their different wording and separate treatment of secured and unsecured creditors – a result Congress did not intend, else it would have written a single subdivision dealing with secured and unsecured alike.

debtor will make monthly payments to the secured creditor over the course of the plan, commonly 3-5 years.

The Chapter 13 plan is debtor's promise to pay overtime. Like any promise, it is worth less than cash in hand. This is particularly true of a Chapter 13 debtor's promise of future payment. The debtor already defaulted once on his promises. Moreover, the track record for Chapter 13 debtors in general is less than sterling. About a third of all such debtors fail to complete their plans, resulting in dismissal of their Chapter 13 cases or conversion into Chapter 7 liquidation. Girth, *The Role of Empirical Data in Developing Bankruptcy Legislation for Individuals*, 65 Ind. L. Rev. 17, 39-41 (1989).

The debtor's promise to pay the value of the collateral over the course of the plan, thus, is inherently of less value than what a secured creditor would receive through straight liquidation – either the property or its value immediately.

Deterioration or depreciation of the collateral while the debtor is in Chapter 13 poses an additional, serious risk for secured creditors. As already noted, about a third of all Chapter 13 proceedings are unsuccessful. The debtor does not propose or does not complete a plan, and the case is dismissed or converted to a Chapter 7 liquidation. Girth, *supra*, 65 Ind. L. Rev. at 39-41. Upon dismissal or conversion, the secured creditor must resort to its collateral for payment of the remaining debt.

Secured creditors commonly find that the property has deteriorated or depreciated during the course of the Chapter 13 far beyond the amount of any payments the secured creditor has received under the plan. The reason

is apparent. Chapter 13 proceedings fail because debtors lack funds to pay creditors the amounts promised under their Chapter 13 plans or lack the financial discipline to do so. The same lack of funds or financial discipline will commonly lead debtors to neglect or defer needed, but often costly, maintenance of the collateral.

Cars are particularly subject to rapid deterioration during the course of Chapter 13 proceedings because they require regular, costly maintenance to remain in operable condition and retain their value. Hard pressed debtors are also likely to skimp on insurance premiums, exposing their secured creditors to risk of total loss of the collateral or the expense of buying insurance for themselves.

Thus, when the Chapter 13 is dismissed and the creditor finally is permitted to foreclose, or when the creditor receives the collateral upon conversion to Chapter 7, it usually finds it has suffered a substantial loss during the delay caused by the failed Chapter 13 proceeding.[3]

As shown in the preceding section, Congress rationally chose to make Chapter 13 debtors compensate

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[3] The theoretical remedy of seeking relief from stay or adequate protection under 11 U.S.C. § 362(d)(1) is not available to secured creditors as a practical matter for several reasons. Secured creditors do not know which Chapter 13 debtors are among the third who will not complete their plans, and they are unlikely to have sufficient evidence to prove debtors are not properly maintaining the collateral. The cost of seeking relief from stay is a substantial deterrent to creditors holding comparatively small secured claims against consumer debtors. *See also* Petition, App. D, p. A-24 (noting the impracticality of of requiring "several thousand adequate protection motions").

secured creditors for these additional risks inherent in Chapter 13 proceedings. That compensation is the required sharing with secured creditors of the enhanced value of the collateral debtors retain under their Chapter 13 plans.

The opinion below improperly ignores these economic realities that underlie and justify Congress' decision in to require Chapter 13 debtors to pay secured creditors the value of the collateral in light of its proposed use by the debtor. This Court should grant certiorari to restore Congress' considered and correct policy choice.

4. The Opinion Below Gives Debtors An Unwarranted Windfall.

The opinion below is also wrong because it gives debtors an unjustifiable windfall. *See Dewsnup v. Timm*, ___ U.S. ___, 112 S.Ct. 773, 778 (1992).

By proceeding under Chapter 13, the debtor already receives the benefit of retaining his or her assets, while paying secured creditors less than the full amount of the debt owed. As already mentioned, Congress properly viewed retention of assets as a major benefit for debtors proceeding under Chapter 13. In addition, particularly in the case of real property collateral, the Chapter 13 debtor retains the benefit of any increase in the value of the property – a benefit which but for Chapter 13 would belong to the creditor whose debt was secured by that collateral. *Ibid.*

There is no reason to give Chapter 13 debtors the further benefit of paying only foreclosure value for collateral which they will retain. Such largess does not come free. It is paid for in higher prices, higher cost of credit or restricted availability of credit.[4] And the people who

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[4] To quote one study of consumer bankruptcy:

> In the competitive market that characterizes consumer credit, credit grantors must cover all of their costs in the rate charged for credit or in the price of goods sold on credit, or shift funds from consumer credit into some other field of economic activity. Thus, all costs of credit grantors must ultimately be paid by consumers. . . .
>
> The wealth transfer has been ably described in the Brookings Institute study of consumer bankruptcies:
>
> > The bankruptcy process operates . . . as a kind of redistributive mechanism whereby goods and services are supplied to one group at the expense of another. In personal bankruptcies, the first group consists of persons whose debts are discharged. The losses incurred by the merchants who sell to them are probably made up in part by sales to cash customers at higher prices than would prevail if debt losses were lower. Another part of those losses is borne by responsible users of credit who pay their debts and who bear their share in the form of higher credit charges or prices. . . .
> >
> > [Stanley & Girth, *Bankruptcy: Problem, Process & Reform* (Brookings Inst. 1971) at 37]
>
> Consequently, debates about public policies that affect the levels of bankruptcy losses should not be presented as a conflict between creditors and consumers. In the long run, in a competitive market bankruptcy costs are borne by consumers. The issue is which group of consumers is harmed and which

ultimately pay the price are other, often poorer, consumers.[5] 1 Credit Research Center, *supra* n. 4, at 96; White, *Economic Versus Sociological Approaches to Legal Research: The Case of Bankruptcy*, 25 Law & Soc. Rev. 685, 697 (1991).

There is no free lunch. There is no reason to force poorer consumers to pay the price of banquets for Chapter 13 debtors. Congress correctly chose to limit the benefits conferred on such debtors and require them to share with their secured creditors the enhanced value of collateral retained in the reorganization.

This Court should grant certiorari to establish a uniform interpretation of 11 U.S.C. §§ 506(a) and 1325(a)(5)(B) that avoids giving Chapter 13 debtors unwarranted windfalls and implements Congress' expressed intent and the statutory language it enacted.

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benefits or, in other words, which group of consumers pays the subsidy and which group receives it.

1 Credit Research Center, *Consumer Bankruptcy Study – Consumers' Right To Bankruptcy: Origins & Effects* (1982) at 93-94 (fns. omitted).

[5] The facts of this case are illustrative. The Mitchells were hardly destitute. Mr. Mitchell ran an apparently successful glass installation business. The Mitchells owned a total of three automobiles, including the Cadillac El Dorado at issue in this case. Petition, App. D, p. A-21. As the bankruptcy court noted in ruling on this case, it regularly sees claims involving relatively expensive cars, such as the Cadillac in this case or the Corvette in another case before it the same morning. *Ibid.*

CONCLUSION

For the reasons stated above, amici curiae pray that the Court grant the petition for certiorari, reverse the judgment of the Ninth Circuit, and hold that collateral retained by a Chapter 13 debtor should be valued at retail value under 11 U.S.C. § 506(a).

Respectfully submitted,

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